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Mr. Corbin Davis
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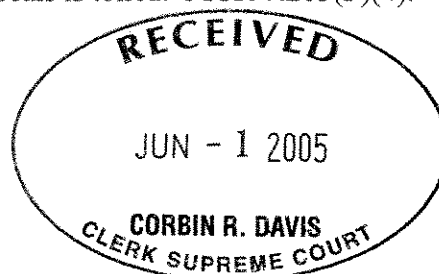
Re: Admin File 2003-04
Six-Month Deadline for Leave Appeals

Dear Mr. Davis:

I am writing to address the proposed changes to court rule MCR 7.205, and by extension the proposed changes to MCR 6.310, MCR 6.419, MCR 6.429 and MCR 6.431. Specifically, I write to address the proposed *six-month deadline* for filing a delayed application for leave to appeal in the Court of Appeals and for filing certain post-conviction motions in the trial court before the delayed application is filed.

I write as head of the Plea Unit within the State Appellate Defender Office. While my primary concern is the appellate deadline for plea cases, I would be happy to address both trial and plea cases as they relate to the proposed court rule changes for leave cases. And I would like to make three points with this letter. First, there is an internal inconsistency in the proposed court rules relating to post-conviction motions for new trial in leave (non-claim) cases. Second, I would urge the Court to modify the proposed rules to leave the language "within the time for filing an application for leave to appeal" in place of the proposed "within six months of entry of the judgment of conviction and sentence" or "within six months of sentence" under MCR 6.429(B)(3) and MCR 6.310(C). And finally, I would strongly urge the Court to consider retaining the current 12-month deadline.

Currently, the court rules permit a defendant to file a motion for new trial, for judgment of acquittal, to withdraw a plea, or for resentencing within 12 months of entry of the judgment of sentence in leave (non-claim) cases. MCR 7.205(F)(4); MCR 6.311(A); MCR 6.419(B); MCR 6.431(A)(3); MCR 6.429(B)(3). If such a motion is filed, the 12-month deadline for filing a delayed application for leave to appeal in the Court of Appeals is tolled. MCR 7.205(F)(4).



The proposed rules would limit the time for filing the motion for plea withdrawal to “six months after sentence” and would limit the time for filing a motion to correct invalid sentence to “six months from the entry of the judgment of sentence or the sentencing date. MCR 6.310(C) (as proposed); MCR 6.429(B)(3) (as proposed). The proposed rules no longer address the outer time limit for filing a motion for new trial or motion for acquittal (although the proposed rules retain the provision for filing either motion within 42 days of judgment). MCR 6.419; MCR 6.431.

With the proposed changes, the Court will first note that it *deleted* the time period for filing a (delayed) post-conviction motion for new trial in a leave case under MCR 6.431(A)(3). The Court deleted the provision that a motion for new trial could be filed “within the time for filing an application for leave to appeal” under MCR 6.431(A)(3). At the same time, however, the Court retained the reference to the filing of a motion for new trial within six months of the entry of the final order under MCR 7.205(F)(4). I am not sure what the Court intended. There appears to be an internal inconsistency here. The appellate court rules seem to allow this motion, while the criminal procedure court rules do not. [The same is true with the proposals for MCR 6.419(B) and MCR 7.205(F)(4) (post-conviction motions for judgment of acquittal).]

Second, and at least for plea withdrawal and resentencing motions, the Court has proposed deleting the current language “within the time for filing an application for leave to appeal” under MCR 6.311(A) and MCR 6.429(B)(3), and replacing it with “within six months of sentence” (for plea withdrawal motions) or “within six months of entry of the conviction and sentence” (for motions to correct invalid sentence). Proposed MCR 6.310(C) and MCR 6.429(B)(3). While I assume the Court’s intent was to ensure consistency between these two rules and the proposed amendment of MCR 7.205(F)(4) (providing a six-month window for the filing certain post-conviction motions), the substituted language is problematic. The beauty of the original language “within the time for filing an application for leave to appeal” was that it included both the standard twelve-month period of MCR 7.205(F)(3) *and* the 42-day window period of MCR 7.205(F)(4)(iii) (the 42-day window period allowed the filing of an appeal *after* the 12-month deadline if the transcript or order of appointment of appellate counsel were delayed). If the Court adopts the proposed six-month language under MCR 6.310(B) and MCR 6.429(B)(3), and yet does not retain the same language “within the time for filing an application for leave to appeal” it will eliminate the defendant’s ability to file a post-conviction motion with the 42-day window period of MCR 7.205(F)(4)(iii).¹ This can be problematic, and downright unfair in some cases, where the defendant makes a timely request for appellate counsel but the court reporter fails to file the transcripts within the six-month period or the trial judge fails to act on the request for counsel within the six-month period. In both situations, the six-month deadline may expire through no fault of the defendant. But under the proposed court rules, the defendant will lose the ability to file a post-conviction motion because it was not filed within six months of the judgment of sentence. I would urge the Court to retain the language “within the time for filing an application for leave to

¹ Defendant recognizes that the filing of a post-conviction motion during the 42-day period (but after the 12-month deadline has expired), does not stop the appellate clock under MCR 7.205(F)(4), but the court rules appear to allow a period of concurrent jurisdiction under MCR 7.205(F)(4), MCR 6.311(A) and MCR 6.429(B)(3). Thus, it is possible to file a post-conviction motion for plea withdrawal, resentencing, new trial or acquittal within the 42-day period and also file a delayed application for leave to appeal at the same time (thereby allowing the defendant to preserve certain issues before or while the delayed application is pending in the Court of Appeals). Jurisdiction does not vest in the Court of Appeals until the application is granted.

appeal” under MCR 6.311(A), MCR 6.310(B) (as proposed) and MCR 6.429(B)(3). It is important to include the 42-day window period as an option for filing post-conviction motions in leave cases.

Finally, I write to urge the Court to consider retaining the 12-month deadline for leave cases (and by extension, the 12-month post-conviction motion period). I understand that a delay of one year in filing the appeal is often unhelpful to resolving the case if relief is granted on appeal, but too many direct appeals will be lost under the proposed court rule changes, and the proposed changes will result in *more* work for the trial courts and the Court of Appeals.

The twelve-month deadline is not a luxury in many cases. For trial appeals where no appeal by right is pending (i.e., leave cases), it will be extremely difficult, if not impossible, to file an application for leave to appeal or a post-conviction motion for new trial within the proposed six-month deadline. The defendant currently has 42 days to request counsel in trial appeals, MCR 6.425(F)(1)(b), and the court reporter has 91 days to file the transcripts, MCR 7.210(B)(3)(b)(iv). Assuming the trial court acts on the request for appellate counsel on the same day it is received, and assuming the request is filed within the 42-day period,² appellate counsel will have approximately 50 days from the filing of the transcripts in which to file the application for leave to appeal (or to file any post-conviction motions). This is *less* time than permitted for filing the brief on appeal when the appeal proceeds as a matter of right, *see*, MCR 7.212(A)(1)(iii). Moreover, this scenario does not consider *any* delay in the request for appellate counsel, the appointment of appellate counsel, or the filing of transcripts. Conceivably, a delayed request for counsel, a delayed transcript, or the delayed appointment of appellate counsel could result in the complete lapse of time to file a post-conviction motion for new trial.

The Court might note that a delayed transcript in leave cases is particularly problematic because the Court of Appeals lacks jurisdiction to force the court reporter to file the transcripts in a timely fashion. The only remedy in this situation is a sanction imposed by the trial court, but trial judges are often reluctant to force their overworked and underpaid reporters to file transcripts upon pain of contempt.

The twelve-month deadline is also important for plea appeals. While the transcripts are due within 28 days in plea cases, MCR 7.210(B)(3)(b)(ii), the reality is that transcripts are not always timely filed and trial courts do not immediately act on requests for appellate counsel in plea cases (and sometimes defendants do not timely request counsel because of uncertainty about their rights in plea cases). In this setting, and under the proposed court rules articulating an absolute six-month deadline under MCR 6.429(B)(3) and MCR 6.310(C) (as proposed and with no 42-day backup period), these defendants will lose the ability to file a post-conviction motion if there is delay by the court reporter or delay by the trial court. The 42-day window period of MCR 7.205(F)(4)(iii) would not permit the filing of a post-conviction motion in this situation because the currently-proposed language refers to “six months of sentence” or “six months of entry of the conviction and sentence.” There is no extension for untimely-filed transcripts or the late appointment of appellate counsel. *Compare*, MCR 7.205(F)(4)(iii) (the 42-day period creates an exception to the standard 12-month deadline and runs from the date appellate counsel is appointed or the transcripts are filed, whichever is later).

² As the Court knows, the trial court retains discretion to grant an untimely request for appellate counsel in trial cases. MCR 6.425(F)(1)(b).

As the Court knows, most of the relief granted in plea appeals is sentencing relief. And most sentencing errors require issue preservation in the trial court. *See, People v Kimble*, 470 Mich 305 (2004); MCL 769.34(10).

The proposed court rules will also take their toll on the appellate and circuit courts. For cases where the transcripts are filed late and/or the trial judge does not timely appoint appellate counsel, there will be *more* filings and *more* paperwork for both the trial and appellate courts (and more headaches for everyone). Smart appellate counsel will be forced to file in the trial court *and* the appellate court in these cases. In other words, counsel will be forced to file a boilerplate, bare-bones motion for plea withdrawal or resentencing or new trial in the trial court (if the transcripts have not been filed) in order to preserve the ability to raise certain issues. And counsel will also be forced to file the application for leave to appeal in the Court of Appeals since the filing of the post-conviction motion will not toll the appellate deadline in 42-day cases. The trial courts will be forced to decide to what extent the motions can be amended to reflect new issues raised by the transcripts, *see*, MCR 2.118 (Amended and Supplemental Pleadings), and the Court of Appeals will be left to address appeals that may have become moot due to subsequent trial court action on the contemporaneously-filed post-conviction motion.

The need to file in two jurisdictions is not fanciful speculation. It is often the reality in 42-day leave cases (which currently are not frequent under the current court rules).³ In *People v Dean Robinson*, Newaygo Circuit No. 02-7809 FH, a typical 42-day leave case under the current rules,⁴ SADO filed a motion for plea withdrawal or resentencing in the trial court on February 14, 2005, and then filed a delayed application for leave to appeal on March 8, 2005 (March 8, 2005 was the 42-day deadline in the Court of Appeals). The motion for plea withdrawal was granted on April 5, 2005. SADO then moved to withdraw the pending application for leave to appeal on April 13, 2005. The appeal was dismissed by order of the Court of Appeals dated May 2, 2005 (Court of Appeals Docket No. 261299).

The proposed court rules will make the necessity of filing in multiple jurisdictions a continuing reality for leave cases (both plea and trial leave cases). The six-month deadline will be exceedingly difficult to meet in many trial leave cases, as illustrated previously. A review of the 32 leave (non-claim) appeals assigned to SADO in the last two years shows that in 12 cases the transcripts were *not* timely filed (the delays ranged from 1 to 64 days). Again, with 42 days to request appellate counsel, 91 days to file the transcripts, and a delay of 64 days or more in the filing of the transcripts, the six-month period will be entirely eliminated.

The threat of multiple filings in plea cases is real as well. This attorney reviewed 30 files in her caseload (randomly chosen) where the plea appeal had not been filed or the matter is pending in the trial court with a post-conviction motion.⁵ Of those thirty, *four* involved transcripts that were filed *more than six months* after the sentencing date.⁶ And an additional two cases involved

³ This attorney has only one 42-day case in her caseload at the present time.

⁴ The case could not proceed under the standard 12-month deadline because the trial court initially denied the defendant's request for appellate counsel, but later granted the request and appointed appellate counsel only one day before the twelve month period expired.

⁵ These files were chosen for ease of reference and do not include files where the appeal is currently pending in the Court of Appeals or Michigan Supreme Court.


⁶ *People v Robert Belluci*, Macomb Circuit No. 03-3215 FH, sentenced 01-07-04, SADO appointed 07-08-04, transcripts filed 08-17-04; *People v Donald Hart*, Clinton Circuit No. 03-

transcripts that were filed five months after the sentencing date.⁷ In other words, in one of five cases the transcripts were not filed until very close to, or after, the six-month deadline.

On the surface it may seem that a 12-month deadline is a luxury and unnecessary, but in reality it is an important safeguard against tardy transcripts and inaction by the trial judge. And without according to appellate counsel a reasonable period of time in which to prepare and file a post-conviction motion in the trial court, the Court of Appeals, and by extension this Court, will see an influx of leave appeals. It will fall to the appellate courts, and not the trial courts, to correct error in these leave cases. With these proposed court rule changes, and if appellate counsel does *not* recognize the need to file in two jurisdictions, the Court will eliminate the trial court as an important avenue of error correction in leave cases. Even if appellate counsel wisely files in two jurisdictions, the Court of Appeals will be left to process an appeal that might easily have been resolved in the trial court.

Again, I urge the Court to retain the 12-month deadline and to leave the language "within the time for filing an application for leave to appeal" in MCR 6.429(B)(3) and MCR 6.311(A) (or as proposed, MCR 6.310(C)).

Sincerely,



Anne Yantus (P39445)
Managing Attorney
Special Unit, Pleas/Early Releases

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cc: File

7324 FH; 02-7201 FH, sentenced 05-21-03, SADO appointed 12-05-03, transcripts filed 12-29-03; *People v Trevor Kanar*, Macomb Circuit No. 01-3665 FH, sentenced 07-21-03, SADO appointed 01-21-04, transcripts filed 04-14-04; *People v Marvin Rolack*, St. Clair Circuit No. 03-2904 FH; 03-2906 FH, sentenced 06-01-04, SADO appointed 02-22-05, transcripts filed 04-19-05.

⁷ *People v Darryl Glass*, Oakland Circuit No. 04-194488 FH, sentenced 04-07-04, SADO appointed 06-15-04, transcripts filed 09-14-04; *People v Curtis Morris*, Wayne Circuit No. 04-18251-01, sentenced 05-14-04, SADO appointed 06-15-04, transcripts filed 10-13-04. There were an additional three files where the transcripts were not filed until four months after the sentencing date. *People v George Dockery*, Oakland Circuit No. 03-189573 FH, sentenced 05-03-04, SADO appointed 07-16-04, transcripts filed 09-14-04; *People v Jerry Doubly*, Kalamazoo Circuit No. 97-0351 FH, sentenced 09-20-04; SADO appointed 10-07-04, transcripts filed 10-16-04; *People v Lashawn Johnson*, Macomb Circuit No. 03-4024 FC, sentenced 08-04-04, SADO appointed 09-10-04, transcripts filed 01-28-05.